In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-100

WILLIAM L. MARTIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 25a-28a) is reported at 459 F. 2d 300. The district court rendered no opinion.

JURISDICTION

The judgment of the court of appeals was entered on April 21, 1972. The petition for a writ of certiorari was

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JURISDICTION

The judgment of the court of appeals was entered on April 21, 1972. The petition for a writ of certiorari was

filed on July 18, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Food Stamp Act of 1964 in providing for *de novo* review of the validity of an administrative disqualification of a food store permits the reviewing court to reduce the term of disqualification although it has found that disqualification was validly imposed under the statute and that the term imposed was within the maximum limit allowed by the statute and implementing regulations.

STATUTES AND REGULATIONS INVOLVED

1. Section 11 of the Food Stamp Act, 7 U.S.C. 2020, provides that:

> Any approved retail food store or wholesale food concern may be disqualified from further participation in the food stamp program on a finding, made as specified in the regulations, that such store or concern has violated any of the provisions of this chapter, or of the regulations issued pursuant to this chapter. Such disqualification shall be for such period of time as may be determined in accordance with regulations issued pursuant to this chapter. The action of disqualification shall be subject to review as provided in section 2022 of this title.

Section 13 of the Act, 7 U.S.C. 2022, provides in pertinent part as follows:

> * * * If the store or concern feels aggrieved by such final determination he may obtain judicial

review thereof by filing a complaint against the United States * * * requesting the court to set aside such determination. * * * The suit * * * shall be a trial de novo by the court in which the court shall determine the validity of the questioned administrative action in issue. If the court determines that such administrative action is invalid it shall enter such judgment or order as it determines is in accordance with the law and the evidence. * * *

2. Section 272.6(a) of the Secretary's regulation, 7 C.F.R. 272.6(a), provides in pertinent part as follows:

> Any authorized retail food store or authorized wholesale food concern may be disqualified from further participation in the [Food Stamp] Program by FNS [Food and Nutrition Service of the U.S. Department of Agriculture] for a reasonable period of time, not to exceed three years, as FNS may determine, if such retail food store or wholesale food concern fails to comply with the Food Stamp Act of 1964, as amended, or the provisions of this part * * *.

STATEMENT

The Secretary of Agriculture disqualified petitioner's retail food store from participation in the Food Stamp Program for six months for admitted violations of the Food Stamp Act of 1964—exchanging non-food items for food stamps. Under the applicable regulations (7 C.F.R. 272.6) the Secretary may disqualify a store for up to three years.

Acceptance of food stamps in exchange for non-food items is expressly prohibited by section 4(a) of the

Food Stamp Act, 7 U.S.C. 2013(a), and 7 C.F.R. 272.2(b). Petitioner admitted that he had been informed of the requirements and that he had been warned on a prior occasion regarding such violations (Pet. App. 3a, 6a, 22a). He also admitted that he had committed the violations (Pet. App. 4a, 22a), attributing them to his negligence in not establishing an instruction program for new employees (Pet. App. 13a).

Petitioner brought this action in the district court to review the disqualification of his store. Judicial review of the "final determination" of disqualification is authorized by section 13 of the Act, 7 U.S.C. 2022, which provides for "a trial de novo by the court in which the court shall determine the validity of the questioned administrative action in issue." Plaintiff did not challenge the merits of the disqualification; he admitted the violations and attacked only the six-month disqualification as too harsh (Pet. App. 1a).

The district court held that the six-month disqualification was "too harsh under the present facts and circumstances, when compared with the reported cases dealing with violations of the same statute, and when obvious, admitted criminal violators in this district receive probation, as in the untaxed liquor cases, and other similar cases" (Pet. App. 23a). The court reduced the disqualification to 30 days.

The court of appeals reversed. The court held that the Food Stamp Act permits *de novo* review of only the validity of the disqualification itself, not its length. It ruled that since the violations were admitted and the disqualification period was within the Secretary's

authority, the district court had no warrant to modify it (Pet. App. 27a).[1]

ARGUMENT

The court of appeals correctly held that the "trial *de novo*" provided by Section 13 of the Food Stamp Act, *supra*, pp. 2-3, covers only the merits of disqualifying the store, not the length of sanction. The decision is in accord with the recent decision of the Fourth Circuit in *Welch* v. *United States* (C.A. 4, No. 71-2019, decided July 11, 1972) and the *dictum* of the Seventh Circuit in *Save More of Gary, Inc.* v. *United States*, 442 F. 2d 36, 39, petition for certiorari dismissed, 404 U.S. 987.

The language of the statute supports the court's conclusion: it provides for *de novo* review of "the validity" of the administrative action which is challenged. A disqualification that is within the Secretary's authorized power is "valid" even though the reviewing court may consider it "too harsh," as the district court did here. The statement in Section 13 that there is to be a *de novo* review of the "validity" of the administrative action distinguishes this statute from other statutes which provide for *de novo* review without this restriction. See, *e.g.*, *Spano* v. *Western Fruit Growers, Inc.*, 83 F. 2d 150, 152 (C.A. 10) (reparation provision of the

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[1] Judge Edwards dissented. While conceding that there was force to the position of the majority, he argued that Congress had not limited judicial review "solely" to a determination of the validity of the administrative action, but had merely used that phrase as descriptive of the review afforded (Pet. App. 29a).

Perishable Agricultural Commodities Act, 7 U.S.C. 499g(c)).

The court's interpretation of Section 13 as not permitting *de novo* review of the length of the disqualification comports with the general rule that suspensions that are within the permissible range of statutory and regulatory authority are not subject to judicial modification.[2] See, *e.g., G.H. Miller & Co* v. *United States,* 260 F. 2d 286, 296 (C.A. 7), certiorari denied, 359 U.S. 907 (Commodities Exchange Act); *Eastern Produce Co.* v. *Benson,* 278 F. 2d 606, 610 (C.A. 3) (Perishable Agricultural Commodities Act); but see *Glover Livestock Commission Company* v. *Hardin,* 454 F. 2d 109 (C.A. 8), petition for certiorari pending, No. 71-1545. The determination of the appropriate sanction for a retail store that has violated the Food Stamp Act is a matter particularly within the expert judgment of the Secretary of Agriculture. The court of appeals correctly concluded that in Section 13 of the Food Stamp Act Congress did not intend to give the district courts authority to substitute their judgment for that of the Secretary with respect to the appropriate penalty.

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[2] *United States* v. *First City Nat. Bank,* 386 U.S. 361, upon which petitioner relies (Pet. 21-22), involved the Bank Merger Act of 1966, under which the district court does not review the action of the bank regulatory agency approving the merger at all, but determines *de novo* the validity of the merger under the antitrust laws.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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